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Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court Of The United States

Mark Weir

Petitioner

v.

William Bratton, Commissioner New York City Police Department

Respondent

On Petition for Writ Of Certiorari
To The Supreme Court of the State of New York,
Appellate Division, First Department.

PETITION FOR WRIT OF CERTIORARI

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I

QUESTIONS PRESENTED FOR REVIEW

WOULD IT BE CONSIDERED A BAD FAITH TERMINATION OF AN EMPLOYEE WHEN IT IS DISCOVERED THAT THE UNDERLYING BASIS FOR THE DISMISSAL WAS ASSUMED MISCONDUCT DERIVED FROM A SECRET INTERNAL INVESTIGATION WHICH UNDER JUDICIAL REVIEW WAS FOUND TO BE INEPT AND A GREAT EXAMPLE OF SLOPPY POLICE WORK?

IN THE COURSE OF A HEARING FOR PETITIONER TO PROVE A BAD FAITH DISMISSAL BY THE EMPLOYER, WOULD THE LOSS OF THE SECRET INTERNAL INVESTIGATIVE FILE EVIDENCE CONSTITUTE AN UNFAIR HEARING AND A DENIAL OF PETITIONER'S DUE PROCESS?

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BRIEF FOR PETITIONER OPINIONS BELOW

The order denying motion from the New York State Supreme Court is appended to this petition for certiorari in Appendix E. The Order and Judgment from the Supreme Court, New York County, Appellate Division, First Department is reported as Weir v. Bratton, 4 A.D.3d 160, 772 N.Y.S.2d 38 (App. Div. 1st Dep't 2004), appears in Appendix A and is published at New York Jurisprudence, Second Edition, Civil Servants : 533 . The Order and Judgment from the Supreme Court of the State of New York, County of New York is unpublished and appears in Appendix B.

JURISDICTION

The judgment of the New York State Court of Appeals was entered on November 18, 2004. Petitioner Weir filed this Writ of Certiorari on February 16, 2005.

STATEMENT OF THE CASE

On October 14, 1994 with 12 years as a Police Officer on The New York City Police Department, Mark Weir, (petitioner) was placed on one year dismissal probation for failure to safeguard his firearm when his girlfriend intentionally shot herself in the leg while speaking with him on the phone. On October 5, 1995, one week prior to completing the probation, petitioner was suspended from duty without explanation. Two weeks later, he was sent a letter dismissing his employment with the NYPD. He commenced an Article 78 proceeding challenging the termination as arbitrary and capricious. Justice Shainswit ordered the NYPD to provide the basis for petitioners dismissal. Respondent served a verified answer containing previously undisclosed Charges of misconduct stemming from a secret internal affairs investigation. The charges alleged that during Petitioner's probation, he had a suspended drivers license and he was observed with a prostitute. Petitioner submitted an Affidavit presenting compelling evidence alleging that the department acted in bad faith. Judge Walter tolub granted a hearing whereby it would be petitioners burden to prove that respondent acted in bad faith in dismissing him. At the hearing, Petitioner testified that there was no problem with his drivers license while on probation. In 1993 a problem occurred when his car was stolen, stripped and left abandoned on the street. Sanitation removed the vehicle and issued Petitioner an Environmental Control Board summons. Petitioner paid the summons back in April 1994, six months prior to the probation starting. Petitioner presented a cancelled check and a

receipt from ECB indicating payment and satisfaction. Petitioner testified that he was never notified that his license was suspended and did not drive with an expired license. Petitioner testified that he never patronized a prostitute and did not receive the Charges and Specifications and that the first time he saw them was when they were included in the respondents verified answer. The Internal affairs investigator; Sgt McFaddan, then testified that two weeks into petitioners probation, a secret IAB investigation started when an anonymous caller stated petitioner has a suspended license and he was in the company of drug dealers and prostitutes. McFaddan claimed he received a printout from the New York State Police Inquiry Network indicating a suspension of petitioner's drivers license due to the identical ECB summons was presented. Other than the NYSPIN printout, neither McFaddan, nor any other member of I.A.B., conducted any further investigation into the status and/or circumstances regarding petitioner's suspended license. No direct contact was made to the Department of Motor Vehicles in order to verify the suspension. No inquiry was ever made of petitioner. Mcfaddan testified that throughout the entire investigative period, petitioner was never interviewed pursuant to GO-15, which interview is mandatory under police department guidelines. McFaddan testified that he did not know why one was not ordered, since this interview is generally useful in any investigation. Had contact been made with petitioner, McFaddan would have discovered that the suspension of petitioner's drivers license was the result of an

ECB summons which was cleared up back in April of 1994. McFadden admitted to performing a summons history check of petitioner which disclosed no unpaid summonses but he could not explain why this fact did not trigger an inquiry into the status of the abandoned vehicle summons. The significance of this non-action is paramount, especially in light of the fact that during this time period, McFaddan conceded there should have been two annual police department uniform inspection process' at which time the department causes a check to be made to determine if a police officer has a valid drivers license. Moreover, he also conceded that during this time period, the department's Internal Affairs Bureau receives a weekly printout from the Department of Motor Vehicles on whether a member of the department has a suspended license. Any suspension would result in a notification to petitioner's commanding officer, to insure that a member of the department would not be sent out to drive a department vehicle with a suspended license. The NYPD Patrol Guide page reflecting these procedures was submitted into evidence. Notwithstanding these safeguards, neither McFaddan, nor any member of I.A.B. spoke with petitioners Commanding Officer to verify if petitioner's license was suspended or expired.

In regard to the charge that petitioner had patronized a prostitute, McFaddan testified that in October 1995 he saw the petitioner pick up a female, drive her to a location near the FDR Drive, park for a period of time and then drop off the female at Avenue B. Upon cross examination, McFaddan admits that he was not the

one who observed the female enter the vehicle and he claimed to be three blocks away from the vehicle when it was parked at the FDR Drive. He stated the woman was later approached by IAB members as she exited a grocery store and she voluntarily agreed to accompany the investigators to the precinct in order to make a videotape confession. The tape was viewed at the hearing. It depicted a homeless woman who was read her Miranda rights and admitted to having sex with a man for money. After viewing the tape, McFaddan testified that the woman was never arrested although she confessed to committing a crime in their presence and he does not know why. After viewing petitioner's eye color (blue), Mcfaddan acknowledged that the description given by the woman (brown) was different, as was his stated residence. The woman indicated that the man said he was from New Jersey and that I.A.B. had information that petitioner did not reside in New Jersey. The woman responded to a question by the interviewer, stating that there was nothing in the vehicle which indicated that the man was an off duty police officer. Moreover, McFaddan testified that the woman never identified the man she was with by name and that she was never shown a photograph or picture of petitioner. McFaddan candidly admitted that " it is quite possible that (petitioner) is not the man who was in the car with her. The I.A.B. report (UF-49) which was submitted into evidence and which was relied upon by the Police Commissioner in making his final determination, clearly states that the woman did identify the man she was with as police officer Weir

(petitioner). This fact is vital in that McFaddan testified that he was well aware of petitioner's probationary status and that anything could trigger his dismissal. As testified to by Captain Croke, the Executive Officer of the Employee Management Division, a police officer on dismissal probation is not served with any new charges and therefore has no way to contest any new allegations. He indicated that although he never recommended termination if the officer did not do anything, an officer did not have to do anything while on dismissal probation to be terminated. Notwithstanding, Croke testified that petitioner was apparently terminated for the reasons set forth in the UF-49. Upon further questioning, Croke testified that the allegations in the UF-49 were "factor(s)" the Police Commissioner can take into account whether to impose the original dismissal penalty, even if they were untrue. The hearing court commented that;

> "The real criterion is, true or not, false or not, whether the allegations are true or not, whether they are mistaken or not, if there was bad faith in bringing about Mr. Weir's termination, that's the issue. I'm telling you right now, I don't know what's in those records, but you're going to have to find bad faith. The fact that the investigation made was inept, unless it was intentionally inept - if it wasn't intentionally inept, then your out of luck Mr. Friess. It's unfortunate but true. Unfortunately, that's the law."

As the evidence developed at the hearing, the court became concerned and made inquiry as to whether there was an investigative file. After determining that there was one, the court asked whether it could be retrieved and then ordered it's production. After eliciting the discrepancy in petitioners eye color on cross-examination, McFaddan was unable to state whether this discrepancy was noted in any of the reports given to superiors. Council for petitioner objected and requested an adverse ruling based on the non-production of the file. Again the court indicated its desire to have the reports in court and was willing to conduct an in camera review before disclosure to petitioner. McFaddan's cross examination continued. He again indicated that without the surveillance reports he could not answer the question as to when the surveillance began, the number of officers who actually made the surveillance and that he did not have the actual report who made the observations. McFaddan testified that the surveillance/investigative reports were not in the folder. Petitioner's counsel again made objection to their loss. Counsel for respondent indicated that he requested the file from IAB and only received what they gave him. He acknowledged that the file was incomplete and that records were missing. The court acknowledged that petitioner had an;

> "Almost insurmountable barrier to scale to get to a point of success in a case like this and for him to be hogtied and not have any access to the materials which formed the decision-making process to discharge Mr. Weir just makes it totally impossible."